

## ANNOUNCEMENT

The REVIEW is pleased to announce the election to the Editorial Board of the following members of the Third Year Class: S. Samuel Arsht, Louis W. Cramer, Josiah E. Dubois and John M. Huebner; and of the following members of the Second Year Class: Arnold I. Coplan, Samuel Edes, Bernard Eskin, Kenneth W. Gemmill, Fred P. Glick, Louis J. Goffman, Frank E. Hahn, Jr., Leonard Helfenstein, Allen J. Levin, Milton N. Nathanson, Harry S. Redeker, Louis B. Schwartz, Harry E. Sprogell and Arnold Winokur.

## NOTES

LIABILITY OF DIRECTORS FOR NEGLIGENT MISMANAGEMENT—Membership on the boards of directors of banks and other types of business organizations is very often regarded as a position of honor, and frequently persons consent to serve as directors solely because of the prestige and distinction which the office affords. Likewise, a corporation may seek as directors persons of reputed success and standing in the community, primarily because of the advantage to the corporation in having an "illustrious" board of directors held out to the public as its managers. Such persons may possess little, if any, specialized training in, or knowledge of, the business of the particular corporation to whose directorate they are elected. A review of the cases discloses that, unfortunately, some directors appear to think that they have discharged the duties of their office simply by being scrupulously honest in their own meager relations with the corporation. And this, even though, by accepting the office of director, the law imposes upon them the duty of supervising and directing the management of the corporate enterprise.<sup>1</sup>

It is interesting to note at the outset that, although the cases have never been in accord on the extent of the personal liability of directors, it has never been doubted that there was some common law duty upon such officers for the violation of which they would be individually liable in damages to the party injured.<sup>2</sup> The scope of this note will be limited to a consideration of the extent to which directors will be held personally liable for their negligence in the management of the corporation.

It is fundamental that, in order to recover from a director on the ground of negligence, there must have been a preëxistent duty to exercise some degree of care owed by the director to the party seeking to recover damages for its breach. In order to determine whether or not such a duty exists, and if it does exist, the precise nature or character of the duty, the courts, with few exceptions, have deemed it necessary to determine as a preliminary matter the nature of the relationship which exists between the director and the party seeking to enforce the personal liability. Suits against directors for mismanage-

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<sup>1</sup> 2 THOMPSON, CORPORATIONS (3d ed. 1927) § 1165. The following provision in the Pennsylvania Business Corporation Law, PA. STAT. ANN. (Purdon, Supp. 1933) tit. 15, § 2852-401, is typical of provisions in the corporation statutes of most of the states: "The business and affairs of every business corporation shall be managed by a board of at least three directors, . . ."

<sup>2</sup> In one of the earliest reported cases involving the individual liability of directors for negligent mismanagement, the liability was enforced. *The Charitable Corporation v. Sutton*, 2 Atk. 400 (Eng. 1742). The earliest case in America in which the question was considered is *Percy v. Millaudon*, 8 Mart. N. S. 68 (La. 1829).

ment are generally brought by the corporation itself, by a receiver for the corporation, by a shareholder, either in his own behalf or on behalf of all other shareholders in a representative action, or by a creditor of the corporation, either in his own behalf or on behalf of all other creditors.

The cases are, and always have been, in conflict on the characterization which they have ascribed to the status of a director.<sup>3</sup> Many courts, perhaps the majority, have declared that a director is a trustee.<sup>4</sup> If he is a trustee, the question at once arises, who are the *cestuis que trustent*, the corporation, the individual shareholders, the creditors, or all of them? Here again there is no uniformity in the decisions, except that all of the courts which have adopted the trust classification agree that a director is a trustee at least for the corporation. Other courts have defined a director as an agent of the corporation.<sup>5</sup> No cases have been found by the writer in which a court has gone so far as to suggest that a director is likewise an agent for the individual shareholders or creditors of the corporation. Thus, the courts which adhere to the agency classification have at least avoided some of the difficulties which have confronted the courts which have adopted the trust classification. Other courts have characterized a director as a mandatory,<sup>6</sup> as a managing partner,<sup>7</sup> or as a bailee.<sup>8</sup> However, the cases which have adopted these latter descriptions represent relatively small minority views which appear very infrequently in modern decisions. There is also to be found a line of cases in which it has been stated that a director is, at the same time, both an agent and a trustee.<sup>9</sup> These cases hold that, as to third persons, the director is an agent of the corporation, but, as to the corporation itself, he is a trustee.<sup>10</sup>

The truth of the matter is that a director is neither an agent<sup>11</sup> nor a trustee<sup>12</sup> in any strict and complete sense, and either appellation is misleading.

<sup>3</sup> In the case of *The Charitable Corporation v. Sutton*, *supra* note 2, the court referred to a director as both agent and trustee.

<sup>4</sup> *Delano v. Case*, 121 Ill. 247, 12 N. E. 676 (1887); *United Society of Shakers v. Underwood*, 9 Bush 609 (Ky. 1873); *Pender v. Speight*, 159 N. C. 612, 75 S. E. 851 (1912); *Williams v. McKay*, 40 N. J. Eq. 189 (1885); *Campbell v. Watson*, 62 N. J. Eq. 396, 50 Atl. 120 (1901); 3 FLETCHER, CORPORATIONS (Perm. ed. 1931) § 838; 2 THOMPSON, *op. cit. supra* note 1, § 1378.

<sup>5</sup> *Frontier Milling etc. Co. v. Roy White etc. Co.*, 25 Idaho 478, 138 Pac. 825 (1914); *Allen v. Cochran*, 160 La. 425, 107 So. 292, 50 A. L. R. 459 (1926); *Ellett v. Newland*, 171 La. 1019, 132 So. 761 (1931); *Ten Eyck v. Pontiac etc. R. R.*, 74 Mich. 226, 41 N. W. 905 (1889); *Cairns v. DuPont*, 135 Misc. 278, 238 N. Y. Supp. 74 (1929); *Cameron v. First Nat. Bank*, 194 S. W. 469 (Tex. Civ. App. 1917).

<sup>6</sup> *Sperling's Appeal*, 71 Pa. 11 (1872); *Citizen's Bldg. Ass'n v. Coriell*, 34 N. J. Eq. 383 (1881); *Swentzel v. Penn Bank*, 147 Pa. 140, 23 Atl. 405 (1892).

<sup>7</sup> *London Financial Ass'n v. Kelk*, 26 Ch. D. 107 (Eng. 1884); *Automatic Self-Cleaning Filter Syndicate Co., Ltd. v. Cuninghame*, [1906] 2 Ch. 34.

<sup>8</sup> See *Hibernia Bldg. Ass'n v. McGrath*, 154 Pa. 296, 304, 26 Atl. 377, 378 (1893).

<sup>9</sup> *McEwen v. Kelly*, 140 Ga. 720, 79 S. E. 777 (1913); 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1089.

<sup>10</sup> *Holcomb v. Forsyth*, 216 Ala. 486, 113 So. 516 (1927); *Union Nat. Bank v. Hill*, 148 Mo. 380, 49 S. W. 1012 (1899); *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163 (1901); *Gray v. Heinze*, 82 Misc. 618, 144 N. Y. Supp. 1045 (1916), *aff'd*, 174 App. Div. 924, 160 N. Y. Supp. 1131 (1916), *aff'd*, 225 N. Y. 646, 121 N. E. 870 (1919); *Killen v. State Bank*, 106 Wis. 546, 82 N. W. 536 (1900).

Some authorities have characterized a director as a trustee for creditors, only after the insolvency of the corporation, but not during its solvency. *Cassidy v. Uhlmann*, 170 N. Y. 505, 63 N. E. 554 (1902); *Miller, Liabilities of Directors and Other Officers* (1928) 4 IND. L. J. 183, 187.

<sup>11</sup> 3 FLETCHER, *op. cit. supra* note 4, § 839.

<sup>12</sup> *Webb v. Cash*, 35 Wyo. 398, 250 Pac. 1 (1926); 2 MACHEN, CORPORATIONS (1908) 1161; *Johnson, Corporate Directors as Trustees in Illinois* (1929) 23 ILL. L. REV. 653.

The status of a director is a distinct legal relationship,<sup>13</sup> and the duties and obligations incident thereto should be determined in any particular case without reference to the laws either of trust or agency, except perhaps by analogy.<sup>14</sup> In some of the more recent decisions there is a tendency to refrain from labelling a director categorically either an agent or a trustee, and to characterize him instead as a quasi-trustee,<sup>15</sup> or simply as a fiduciary.<sup>16</sup> In the final analysis it must be recognized that the relation of a director to the corporation is *sui generis*.<sup>17</sup> A director is an officer of the corporation intrusted with its management for the benefit of the shareholders as a body, and as such his status is that of a fiduciary for the corporation<sup>18</sup> and for its shareholders collectively.<sup>19</sup>

It is axiomatic that a fiduciary must exercise some degree of care in the performance of his obligations. The precise degree of care required of a director, to which a failure to conform will render him personally liable, will now be considered. As has already been stated, the decisions of the courts are far from uniform on this particular problem. However, there are a few general principles upon which all courts will agree. First, a director is not bound to exercise the highest possible degree of care in the management of the corporation.<sup>20</sup> Second, he is not liable for an ordinary mistake or error of judgment.<sup>21</sup> Third, he is liable in any event for "gross negligence",<sup>22</sup> and gross negligence has been variously defined by different courts as meaning anything from less diligence than that exercised by a prudent man about his own affairs<sup>23</sup> to that "degree of inattention and want of care indicative either of wilful recklessness, or intent to defraud or permit others to defraud".<sup>24</sup>

There are three distinct rules or standards of conduct which the courts have used in order to determine, in any particular case, whether or not a director has been guilty of actionable negligence in the management of the corporation. One view, which has never met with wide approval, and which

<sup>13</sup> 2 THOMPSON, *op. cit. supra* note 1, § 1379; 2 MACHEN, *loc. cit. supra* note 12; Lynch, *Diligence of Directors in the Management of Corporations* (1914) 3 CALIF. L. REV. 21.

<sup>14</sup> See *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. D. 1, 12 (Eng. 1882); 3 FLETCHER, *op. cit. supra* note 4, § 847.

<sup>15</sup> *North Carolina Corporation Commission v. Harnett County Trust Co.*, 192 N. C. 246, 134 S. E. 656 (1926); *Roscow v. Bizzell*, 199 N. C. 656, 155 S. E. 558 (1930). "Directors are not express trustees. . . . At most, they are implied trustees. . . ." *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 649, 15 S. W. 448, 453 (1891).

<sup>16</sup> *Lippitt v. Ashley*, 89 Conn. 451, 94 Atl. 995 (1915); *Prudential Trust Co. v. Brown*, 271 Mass. 132, 171 N. E. 42 (1930). In both these cases the courts carefully refrained from labelling directors in the classic manner and merely stated that they occupied the position of fiduciaries.

<sup>17</sup> Johnson, *supra* note 12.

<sup>18</sup> The recently enacted Pennsylvania Business Corporation Law, *supra* note 1, § 2852-408, defines the status of a director as follows: "Officers and directors shall be deemed to stand in a fiduciary relation to the corporation . . ." This provision is taken verbatim from section 33 of the Uniform Business Corporation Law, 9 U. L. A. 39 (1932), which was put in the Act for the express purpose of clarifying this confused issue.

<sup>19</sup> 3 FLETCHER, *loc. cit. supra* note 4.

<sup>20</sup> See *Prudential Trust Co. v. Brown*, *supra* note 16, at 137, 171 N. E. at 44; 3 COOK, CORPORATIONS (8th ed. 1923) § 703.

<sup>21</sup> 2 THOMPSON, *op. cit. supra* note 1, §§ 1381, 1382; 2 MACHEN, *op. cit. supra* note 12, §§ 1533, 1534; 1 MORAWETZ, CORPORATIONS (2d ed. 1886) § 553. However, it is not every mistake of judgment which is excusable. *Hun v. Cary*, 82 N. Y. 65 (1880).

<sup>22</sup> 3 FLETCHER, *op. cit. supra* note 4, § 1033.

<sup>23</sup> *Wallace v. Lincoln Sav. Bank*, *supra* note 15. See *McEwen v. Kelly*, *supra* note 9, at 723, 79 S. E. at 779, where Lumpkin, J., stated: "Some courts have declared that they are only liable for gross negligence or breach of duty resulting in injury. But in some, probably most, of the cases so declaring, it will be found that the failure of directors to use ordinary care in supervision has been treated as amounting to gross negligence."

<sup>24</sup> 3 FLETCHER, *op. cit. supra* note 4, § 1034.

has practically disappeared in modern cases, is that directors are liable for "gross negligence" only,<sup>25</sup> since the compensation which they receive is not intended to be commensurate with the value of the services which they are expected to render. The leading case advocating such a standard is *Spering's Appeal*<sup>26</sup> in which Mr. Justice Sharswood, speaking for the Supreme Court of Pennsylvania, stated:

"While directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement or wilful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud and misconduct has been perpetrated by agents, officers or co-directors, yet they are not liable for mistakes of judgment, even though they may appear to us absurd and ridiculous, provided they are honest and provided they are fairly within the scope of the powers and discretion confided to the managing body."<sup>27</sup>

There is nothing to commend any doctrine which countenances mistakes of judgment which are "absurd and ridiculous" when measured by the standard of ordinary business judgment, simply because the directors acted honestly and within the scope of their authority.

Opposed to this view is the rule announced in the case of *Hun v. Cary*,<sup>28</sup> to the effect that directors must exercise in the management of the corporation that degree of care, skill and diligence which ordinarily prudent men exercise in the conduct of their own business.<sup>29</sup> Many of the cases which subscribe to this standard of conduct liken a director to a trustee of a private trust, and hold him strictly accountable for his neglect of the corporate affairs.<sup>30</sup>

The third standard prescribes a rule of conduct for directors which requires a degree of care greater than that required by the first of the above mentioned rules but somewhat less than the second, and has been adopted by a majority of the courts which have considered the problem. These courts hold that a director is bound to exercise that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances.<sup>31</sup> Under this view, the standard of duty by which the conduct of a director is to be measured is that set by the ordinary *director*, and not that set by the ordinary *man*.<sup>32</sup>

However, a careful examination of the decisions reveals that the conflict in standards is, in most cases, more apparent than real. In the final analysis, each case must be, and is, decided on its own facts and, in many instances, without

<sup>25</sup> *Spering's Appeal*; *Citizens' Bldg. Ass'n v. Coriell*; *Swentzel v. Penn Bank*, all *supra* note 6.

<sup>26</sup> *Supra* note 6.

<sup>27</sup> *Spering's Appeal*, *supra* note 6, at 24.

<sup>28</sup> *Supra* note 21.

<sup>29</sup> *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621 (1901); *Besseliew v. Brown*, 177 N. C. 65, 97 S. E. 743 (1919); *Williams v. McKay*; *Campbell v. Watson*, both *supra* note 4; *Kavanaugh v. Gould*, 223 N. Y. 103, 119 N. E. 237 (1918).

<sup>30</sup> *Besseliew v. Brown*, *supra* note 29; *Williams v. McKay*; *Campbell v. Watson*, both *supra* note 4. "A trustee must in all events use such care as a *man of ordinary prudence uses in his own business of a similar nature*." 1 PERRY, TRUSTS (7th ed. 1929) 737. (Italics inserted.)

<sup>31</sup> *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924 (1891); *Gamble v. Brown*, 29 F. (2d) 366 (C. C. A. 4th, 1928); *Rankin v. Cooper*, 149 Fed. 1010 (W. D. Ark. 1907); *McEwen v. Kelly*, *supra* note 9; *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky. 306, 8 S. W. 885 (1888); *Lippitt v. Ashley*; *Prudential Trust Co. v. Brown*, both *supra* note 16; *Devlin v. Moore*, 64 Ore. 433, 130 Pac. 35 (1913); *Conaty v. Torghehen*, 46 R. I. 447, 128 Atl. 338 (1925); *McCollum v. Dollar*, 213 S. W. 259 (Tex. Comm. App. 1919).

<sup>32</sup> *Allen v. Roydhouse*, 232 Fed. 1010 (E. D. Pa. 1916).

reference to the rule of conduct previously announced by the court.<sup>33</sup> It must be borne in mind that the preceding rules are, at most, merely abstract measuring rods, and whether, in a given case, a particular course of conduct constitutes actionable negligence is a question of fact.<sup>34</sup> It is possible, in many instances, upon the same state of facts, that different courts, applying the same standard of care, may reach opposite conclusions,<sup>35</sup> and likewise, different courts, applying different standards of care, may reach identical results. In many instances it may be difficult, if not impossible, to decide in advance of an adjudication whether, as a matter of law, directors have failed to exercise that degree of care which will render them individually liable for resultant damages. The following quotation from a leading text writer represents an accurate analysis of the problem.

"The plain and obvious rule is, that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances; the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution."<sup>36</sup>

Whatever conflict exists in the decisions is due, in large measure, to the fact that there are two distinct viewpoints from which the courts have regarded the problem of the extent of the liability of directors for merely negligent management of the corporation.<sup>37</sup> Many courts have looked at the problem from the viewpoint of the director, and have attached much weight to the fact that he receives little or no compensation for his services. They have expressed the fear that, if the liability imposed for merely negligent conduct is too severe, it will be difficult to find honest men willing to assume the responsibilities of the office.<sup>38</sup> On the other hand, there are those courts which have viewed the problem primarily from the viewpoint of the public, and have attempted to protect the interests of the shareholders and creditors of the corporation.<sup>39</sup> Although, nominally, the standards of conduct enunciated by the courts in recent years are the same as they were a half century ago, it is evident from the decisions that the courts are, in fact, holding the directors accountable for a higher degree of care, diligence and judgment than did the courts which first announced the very rules which are being applied today. It is no longer possible for a director, who has been little more than a figurehead,

<sup>33</sup> The Supreme Court of the United States, in the case of *Bates v. Dresser*, 251 U. S. 524, 40 Sup. Ct. 247 (1920), held that directors were not negligent in failing to examine the books of a bank, and this conclusion was reached without the aid of any rule or standard of conduct for directors.

<sup>34</sup> *Briggs v. Spaulding*, *supra* note 31; *Burckhardt v. Northwestern Nat. Bank*, 38 F. (2d) 568 (C. C. A. 9th, 1930); *cf. Lippitt v. Ashley*, *supra* note 16.

<sup>35</sup> In *Lippitt v. Ashley*, *supra* note 16, both the majority and minority opinions applied the same standard of conduct for directors but reached different results in applying the facts to the law.

<sup>36</sup> I MORAWETZ, *op. cit. supra* note 21, § 552.

<sup>37</sup> (1932) 16 MINN. L. REV. 588.

<sup>38</sup> *Spering's Appeal*; *Citizens' Bldg. Ass'n v. Coriell*; *Swentzel v. Penn Bank*, all *supra* note 6; *Savings Bank of Louisville's Assignee v. Caperton*, *supra* note 31; *Robertson, Liability of Directors* (1926) 4 CAN. B. REV. 358. This view is criticized in 2 THOMPSON, *op. cit. supra* note 1, § 1387.

<sup>39</sup> *Williams v. McKay*; *Campbell v. Watson*, both *supra* note 4; *Prudential Trust Co. v. Brown*, *supra* note 16.

to escape liability for the consequences of his negligence by pleading, when called to account for his dereliction, that he has acted honestly and in good faith.<sup>40</sup> The day of decisions like *Spering's Appeal* and *Briggs v. Spaulding*,<sup>41</sup> both landmarks in the development of the law on this subject, is definitely past.<sup>42</sup> In their place, are decisions like *Lippitt v. Ashley*,<sup>43</sup> in which the court, though applying the same standard of conduct as that enunciated by the court in the *Briggs* case, nevertheless held the directors liable for a comparatively slight omission of duty.<sup>44</sup>

Assuming that a director has been guilty of actionable negligence, who are the parties to whom he is liable for his misconduct? There can be no doubt that the corporation itself is a proper party to enforce the director's personal liability, since he is a fiduciary for the corporation.<sup>45</sup> Likewise, a receiver for the corporation, succeeding to the rights of the corporation, may recover from the directors for damages sustained by the corporation because of their negligence.<sup>46</sup> For the same reason, an individual shareholder may, on behalf of the corporation, bring a shareholder's representative action against the negligent directors to obtain redress for a loss which the corporation itself has suffered.<sup>47</sup> Under special circumstances, a creditor may, by a creditor's bill, on behalf of all other creditors, bring an action similar to a shareholder's representative suit against the negligent directors.<sup>48</sup>

Uniformity in the decisions, however, ceases at this point. When the action is brought by an individual shareholder or creditor of the corporation in his own behalf, the problem becomes more difficult, and the courts are divided in the conclusions which they have reached. Here again, the great majority of courts have deemed it necessary to resort to their preliminary determination of the category in which the office of director must be placed, *i. e.*, to the question of whether his status is that of an agent or trustee.

In those jurisdictions where a director has been classified as an agent of the corporation, it has been held that his relation to the individual shareholders and creditors of the corporation is exactly the same as the relation which the agent of any individual bears to the creditors of such individual, and the usual

<sup>40</sup> Dwight, *Liability of Corporate Directors* (1907) 17 YALE L. J. 33.

<sup>41</sup> *Supra* note 31. In this case the directors left the entire management of the bank to the president who embezzled large sums of money and otherwise mismanaged its affairs. The directors held no meetings for a long period of time.

<sup>42</sup> For an excellent discussion on the development of the law on this subject in Pennsylvania from the time of *Spering's Appeal* until 1916, see Rhoads, *Personal Liability of Directors for Corporate Mismanagement* (1916) 65 U. OF PA. L. REV. 128. With the passage of the new Pennsylvania Business Corporation Law, *supra* note 1, the rule of *Spering's Appeal* has been discarded in Pennsylvania, and, nominally at least, directors are now required to conform to a high standard of conduct. Section 408 of the Act provides: "Officers and directors shall be deemed to stand in a fiduciary relation to the corporation, and shall discharge the duties of their respective positions in good faith and with that diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in their personal business affairs."

It is interesting to note that this is a codification of the rule of *Hun v. Cary*, *supra* note 21, in which case the rule of *Spering's Appeal* was severely criticized.

<sup>43</sup> *Supra* note 16.

<sup>44</sup> The negligence consisted of a failure to require the treasurer of a bank, who, it later developed, had embezzled funds, to take a trial balance. The trial balance, even if it had been taken, would not have disclosed the embezzlement to the directors, because the trial balance was for the treasurer's use only. The directors were otherwise exceedingly diligent in their management of the bank.

<sup>45</sup> 2 THOMPSON, *op. cit. supra* note 1, § 1429; 3 FLETCHER, *op. cit. supra* note 4, § 1276.

<sup>46</sup> 2 THOMPSON, *op. cit. supra* note 1, § 1431; 3 FLETCHER, *op. cit. supra* note 4, § 1277.

<sup>47</sup> 3 FLETCHER, *op. cit. supra* note 4, § 1283.

<sup>48</sup> *Ham v. Norwood*, 196 N. C. 763, 147 S. E. 291 (1929).

principles of liability applicable to an agent have been invoked.<sup>49</sup> Some of the decisions which have adopted the agency classification have held flatly that the individual shareholders and creditors are strangers to the obligation of the director to exercise care in the management of the corporation, and that only the corporation, or someone suing in the right of the corporation, can call him to account for his negligent mismanagement.<sup>50</sup> On the other hand, many of the courts, in order to determine the right of a party to sue, have considered whether the director has been guilty of "misfeasance or nonfeasance".<sup>51</sup> The distinction between the two types of conduct is not satisfactory, and, at best, is tenuous.<sup>52</sup> Exactly what is meant by either term cannot be stated with accuracy, and it would be mere conjecture in many instances to determine in advance whether a given course of conduct constitutes "misfeasance" or "nonfeasance". Although some courts still make distinctions between these two types of conduct,<sup>53</sup> there is a decided tendency in many of the more recent cases to refuse to distinguish between them, and to hold directors liable for acts of "nonfeasance" as well as for acts of "misfeasance".<sup>54</sup>

In those jurisdictions where a director has been characterized as a trustee, the courts have been faced with different, but equally perplexing, problems. A variety of answers have been given by different courts in reply to the question, "For whom is the director a trustee?" Some courts have said that a director is a trustee for the individual shareholders as well as for the corporation,<sup>55</sup> while other courts have held that he is not.<sup>56</sup> Still again, it has frequently been held that a director is also a trustee for the individual creditors,<sup>57</sup> whereas other courts have expressly denied this.<sup>58</sup> It is hardly necessary to state that, where a director is held to be a trustee for the individual shareholders and creditors, the latter are entitled to enforce the director's personal liability for negligence which results in damage to their interests. Conversely, where it is determined that a director is not a trustee for the individual shareholders or creditors, it is held that the latter are not proper parties to bring an action against a negligent director to recover their loss.<sup>59</sup>

The courts have unnecessarily complicated the problem of determining the parties to whom a director is liable for his negligent mismanagement. By

<sup>49</sup> Webb v. Cash, *supra* note 12; Hart v. Evanson, 14 N. D. 570, 105 N. W. 942 (1895).

<sup>50</sup> Clark v. Lawrence, Fed. Cas. No. 2,827 at 888 (C. C. D. Mass. 1856); Allen v. Cochran, *supra* note 5; Union Nat. Bank v. Hill, *supra* note 10; Hart v. Evanson, *supra* note 49; Daniels v. Berry, 148 S. C. 446, 146 S. E. 420 (1929); Deadrick v. Bank of Commerce, 100 Tenn. 457, 45 S. W. 786 (1898); cf. Kelly v. Dolan, 233 Fed. 635 (C. C. A. 3d, 1916); Niles v. New York *etc.* R. R., 176 N. Y. 119, 68 N. E. 142 (1903).

<sup>51</sup> Allen v. Cochran, *supra* note 5; Fusz v. Spaunhorst, 67 Mo. 256 (1878); cf. Cairns v. DuPont, *supra* note 5.

<sup>52</sup> Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358 (1899) (distinction criticized).

<sup>53</sup> Allen v. Cochran; Cairns v. DuPont, both *supra* note 5.

<sup>54</sup> Minnis v. Sharpe, 198 N. C. 364, 151 S. E. 735 (1930); 3 FLETCHER, *op. cit. supra* note 4, § 1161.

<sup>55</sup> Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232 (1903); see Delano v. Case; United Society of Shakers v. Underwood, both *supra* note 4; Chicago Title and Trust Co. v. Munday, 297 Ill. 555, 562, 131 N. E. 103, 105 (1921).

<sup>56</sup> Bawden v. Taylor, 254 Ill. 464, 98 N. E. 941 (1912); Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445 (1905); Connolly v. Shannon, 105 N. J. Eq. 155, 147 Atl. 234 (1929); 3 FLETCHER, *op. cit. supra* note 4, § 848.

<sup>57</sup> Delano v. Case, *supra* note 4; Solomon v. Bates, 118 N. C. 311, 24 S. E. 478 (1896); see Chicago Title & Trust Co. v. Munday, *supra* note 55; Anthony v. Jeffress, 172 N. C. 378, 90 S. E. 414 (1916); Williams v. McKay; Campbell v. Watson, both *supra* note 4.

<sup>58</sup> Webb v. Cash, *supra* note 12; Daniels v. Berry, *supra* note 50; Hart v. Evanson, *supra* note 49; Union Nat. Bank v. Hill, *supra* note 10.

<sup>59</sup> Union Nat. Bank v. Hill, *supra* note 10.

deciding in advance that a director is an agent or a trustee for certain parties, the courts have assumed that which is necessary to be proved, *viz.*, the existence of any duty on the part of the director to the individual shareholders or creditors to exercise care in the management of the corporation. Bearing in mind that this note deals with the liability of directors for negligence only, and not for fraud or deceit, this is the fundamental and, in fact, the only question involved, at least as far as the question of parties is involved.

There are two types of losses which individual shareholders or creditors may suffer as a result of the negligence of the directors. First, and by far the most frequent, are those losses which fall upon all shareholders and creditors in like measure, because the corporation itself has, in the first instance, been injured. The individual shareholders and creditors have been affected only indirectly. If the corporation is not rendered insolvent, the creditors would suffer no loss. Likewise, a recovery by an individual shareholder or creditor would not bar the right of the corporation to recover from the directors,<sup>60</sup> and this would result substantially in a double recovery for the shareholder. A director owes a duty to refrain from negligent conduct which results in a primary injury to the corporation to the corporation itself and the shareholders collectively, if there is any distinction between the two. Where the loss is of this nature, the right to recover is an asset vested in the corporation itself or in some one suing in its right.<sup>61</sup>

A second type of loss which an individual may suffer as a result of the negligence of the directors is one which is peculiar to himself, and which has not fallen in like measure on all other shareholders and creditors of the corporation. The most common illustration of this type of injury is the situation where, due to the negligence of the directors, the corporation has published a false report of its financial condition, and certain individuals, in reliance thereon, have been induced either to purchase shares of stock in the corporation or to extend credit to it. In such a situation the corporation itself has suffered no injury. On the contrary it has, in fact, benefited. The loss has fallen directly upon the individual shareholders and creditors who had relied upon the false reports and upon no others. Therefore, such persons should be entitled to bring an action, in their own right, against the directors for negligence in permitting the false reports to be circulated.<sup>62</sup> An action of this kind borders upon and strongly resembles an action on the case for fraud and deceit. While a director owes a duty to no one other than the corporation to refrain from negligently dissipating, or permitting to be dissipated, the assets of the corporation; he does owe a duty to third parties to refrain from negligently creating a situation, or permitting a situation to exist, which will induce such persons to deal with the corporation in reliance thereon and to their detriment.<sup>63</sup>

S. S. A.

RELiance UPON AN UNCONSTITUTIONAL STATUTE AS A DEFENSE TO CRIMINAL PROSECUTION—The question may arise whether the defendant in a criminal action may successfully offer as a defense the fact that his allegedly criminal conduct conformed to the provisions of a statute which has since been

<sup>60</sup> 3 FLETCHER, *op. cit.* *supra* note 4, § 1282.

<sup>61</sup> Bailey v. Mosher, 63 Fed. 488 (C. C. A. 8th, 1894); Kelly v. Dolan, *supra* note 50; Besseliw v. Brown, *supra* note 29; Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195 (1925); Note (1932) 20 CALIF. L. REV. 426; Note (1930) 8 N. C. L. REV. 459.

<sup>62</sup> Frontier Milling *etc.* Co. v. Roy White *etc.* Co.; Cameron v. First Nat. Bank, both *supra* note 5; Houston v. Thornton, 122 N. C. 365, 29 S. E. 827 (1898); Childs v. White, 158 App. Div. 1, 142 N. Y. Supp. 732 (1913); Seale v. Baker, 70 Tex. 283, 7 S. W. 742 (1888); Cassidy v. Uhlmann, *supra* note 10.

<sup>63</sup> Cameron v. First Nat. Bank, *supra* note 5 (action brought by creditor); Childs v. White, *supra* note 62 (action brought by shareholder).



declared unconstitutional. For example, a statute creates a crime, and a later statute purports to repeal it. X, believing that the repeal is effective, acts in a manner forbidden by the first statute. The repealing statute is later declared unconstitutional by the highest court of the state.<sup>1</sup> Can X be convicted of the violation of the first statute? What statute was in effect prior to the declaration of unconstitutionality? The present prominence of recent social legislation, the constitutionality of which has yet to be tested, suggests an investigation of the possibility of basing defenses upon reliance upon an unconstitutional statute.<sup>2</sup>

It must first be determined what the *status* of an unconstitutional statute is, in the period prior to the declaration of its unconstitutionality,<sup>3</sup> when there is no reliance upon its supposed validity. In civil cases, there appears to be a divergence of authority. Some courts hold that in that period it is the law of the land, the basis of rights and duties;<sup>4</sup> other courts hold that it is "without legal effect, null and void",<sup>5</sup> and allow no defenses based upon it, unless the plaintiff for some reason may be found to have "estopped" himself from pleading the unconstitutionality of the statute.<sup>6</sup> Without commitment to the proposition that in the criminal law an unconstitutional statute is in reality "null and void",<sup>7</sup> as some judicial utterances would indicate, it may simply be stated that the cases uniformly hold (1) that there may be no valid conviction founded upon an unconstitutional statute,<sup>8</sup> and (2) that an unconstitutional statute, purporting to repeal an existent statute and substitute a new set of social rules, does not repeal the existent statute, irrespective of the ground on which the second statute was declared unconstitutional.<sup>9</sup>

<sup>1</sup> The discussion is limited to cases where the statute is declared *totally* unconstitutional. The effect of partial unconstitutionality is necessarily a separate consideration. Reliance upon the statute may be actual or implied. The courts apparently make no distinction between cases where the defendant actually knew of the repealing statute, and cases where the defendant's conduct was unconsciously in conformity with it. In the latter cases he is said to be "presumed to know" of the statute. See *Continental Supply Co. v. Abell*, 24 Pac. (2d) 133 (Mont. 1933).

<sup>2</sup> For treatments of the general subject, see Field, *Effect of an Unconstitutional Statute* (1926) 1 IND. L. J. 1; Note (1926) 39 HARV. L. REV. 373; Note (1932) 6 CIN. L. REV. 185; Note (1929) 29 COL. L. REV. 1140.

<sup>3</sup> The *prima facie* validity of the statute, which may operate to rebut the presumption of knowledge of the law, ceases at the moment the supreme court declares the statute invalid. *Woolsey v. Dodge*, 6 McLean 142 (C. C. Ohio, 1854); *Titus v. Poland Coal Co.*, 275 Pa. 431, 119 Atl. 540 (1923).

<sup>4</sup> *Lang v. Bayonne*, 74 N. J. L. 455, 68 Atl. 90 (1907); *Beaver v. Hall*, 142 Tenn. 416, 217 S. W. 649 (1920).

<sup>5</sup> *Norwood v. Goldsmith*, 168 Ala. 224, 53 So. 84 (1910); *Chenango Bridge Co. v. Paige*, 83 N. Y. 178 (1880).

<sup>6</sup> For an example of this rather frequent practice, see the case of *Jensen v. Jensen*, 92 Colo. 169, 18 Pac. (2d) 1016 (1933).

<sup>7</sup> For support of the thesis that the existence of the crime is dependent on the ability of the state to punish, see the holdings of *Ex parte Taft*, 284 Mo. 531, 225 S. W. 457 (1920); *Mossey v. United States*, 266 Fed. 18 (C. C. A. 2d, 1920); *Commonwealth v. Smith*, 266 Pa. 511, 109 Atl. 786 (1920); *State v. Truax*, 130 Wash. 69, 226 Pac. 259 (1924). One of the commonest illustrations of the thesis is the fact that after a repealing statute becomes effective, unless such statute contains a saving clause, no convictions may be obtained for violations of the repealed statute, on the ground that the authority to punish must exist at the time the sentence is to be imposed. *People v. Brown*, 273 Ill. 169, 112 N. E. 462 (1916); *De Four v. United States*, 260 Fed. 596 (C. C. A. 9th, 1919) (saving clause).

<sup>8</sup> *Gandy v. State*, 162 Ala. 678, 49 So. 801 (1909); *Norwood v. State*, 136 Miss. 272, 101 So. 366 (1924); *McFarlin v. State*, 123 S. W. 133 (Tex. Cr. App. 1909); *Snyder v. State*, 57 S. W. (2d) 855 (Tex. Cr. App. 1933); *Venn v. State*, 210 S. W. 534 (Tex. Cr. App. 1919).

<sup>9</sup> See Note (1930) 66 A. L. R. 1483. If, however, the intention of the legislature to repeal irrespective of the validity of the substitutionary statute is manifest, the courts will declare that the first statute is repealed. *Meshmeier v. State*, 11 Ind. 482 (1858); *Ely v. Thompson*, 3 A. K. Marsh. 981 (Ky. 1820).

These considerations are persuasive that an unconstitutional criminal statute may never properly be regarded as binding law. The defendant is therefore not permitted to say that in relying upon the seemingly valid statute he was conforming to "the law of the land". In consequence, the nature and legal efficacy of the defendant's *belief* that he was acting in a manner socially desirable and legally sanctioned must be investigated.

### I. *The Nature of the Defendant's Belief*

A person may erroneously believe in one of two ways that his conduct is legally sanctioned: he may either be under what is juristically described as a "mistake of law" or as a "mistake of fact". It would seem that a proper distinction between a mistake of fact and a mistake of law is that in the former situation the actor is under a false impression as to the existence or character of an *entity* in the outside world, while in the latter situation he is under a false impression as to the existence or character of the *relations* between an entity in the outside world and himself.<sup>10</sup> If this premise be accepted, it should follow that the defendant, in believing that an invalid statute was legally in effect, was under a *mistake of law*, since he believed that by virtue of that statute he had a right to deal in a certain manner with known entities.

The application of the doctrine generally accepted in the criminal law, *ignorantia legis non excusat*, is immediately suggested. An unconstitutional statute, never operative, it may be claimed, is no basis for rights or defenses. Intimations to this effect are fairly frequent in judicial rationalization.<sup>11</sup> A concise statement of the thought appears in *State v. Greer*:<sup>12</sup>

"The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the Constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the Constitution. It is not material whether the courts adjudge a statute to conflict with an express provision, or with a necessarily implied provision of the Constitution, since, if a conflict with organic law is adjudged, it is equally effective to let the Constitution nullify the statute . . ."

<sup>10</sup> A belief, according to criminal jurisprudence, may be either as to the existence of a "law" or of a "fact". If that belief be mistaken, it is classified accordingly as a "mistake of law" or as a "mistake of fact". A distinction between the two is certainly difficult. In a sense, it may be declared that the existence of a law is just as much a fact as the existence of any other thing. But the law has been regarded as a system, a method, a process of reasoning, evidenced, it is true, by concrete holdings, but nevertheless vaster and more abstract. The distinction advocated in the text may be elucidated by two illustrations. (1) *A*, reasonably believing *B*, his servant, to be a burglar, shoots and kills *B*. *A* is not guilty of the murder of *B*. (2) *A*, believing that he has a right to kill *B* because *B* is subject to him as his servant, shoots and kills *B*. *A* is guilty of the murder of *B*. In (1), although it is true that *A* intended to shoot the man before him at the time he shot, he may negative this *prima facie* criminal intent by showing that his intent to kill a burglar caused his intent to kill his servant. In (2), he can only show that a belief that he had a right to kill *his servant* caused him to intend to kill his servant. In (1), he negatives his *prima facie* criminal intent by a nonculpable intent; in (2), he merely colors his *prima facie* criminal intent by a *belief*. For it may be stated as axiomatic that a person only intends in regard to definite entities; that he never really intends in regard to intangibles. There is therefore no inconsistency in the refusal of the criminal law to attach the same weight to the two kinds of mistake as defenses.

<sup>11</sup> *Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S. E. 120 (1923); *Cohen v. City of Henderson*, 182 Ky. 658, 207 S. W. 4 (1918).

<sup>12</sup> 88 Fla. 249, 264, 102 So. 739, 745 (1924).

But despite the doctrine of *ignorantia legis non excusat*, despite the oft-repeated rhetoric that everyone is presumed to know the law,<sup>13</sup> it would appear that in certain situations valid defenses may be based upon the fact that the defendant relied upon the provisions of an unconstitutional statute.

## II. *The Adequacy of a Defense Based Upon Reliance When the Statute Has Never Been Adjudged Valid*

It is patent that no authoritative answer can be given to the question of the defendant's criminal responsibility which does not take into account the peculiar nature of the statute under which he is indicted, and the common law background thereof. Generalizations must therefore be made with extreme caution. The peculiarities of the criminal *mens rea* of particular groups of crimes must be noticed.

(a) There are statutes providing in effect that the mere commission of a proscribed act may constitute a crime.<sup>14</sup> Even a reasonable mistake of fact cannot excuse in such case.<sup>15</sup> Most of the cases where belief in the validity of an unconstitutional statute was not allowed as a defense are cases dealing with such laws—violations of license laws<sup>16</sup> and state liquor laws.<sup>17</sup> An illustrative recent case is that of *Dupree v. State*.<sup>18</sup> The defendant was indicted for shooting squirrels in a closed season. He pleaded that his conduct was proper under a statute which purported to repeal the statute under which he was indicted. The repealing statute was declared unconstitutional because it was special legislation, and the conviction sustained.<sup>19</sup>

(b) In the case of *Godwin v. State*,<sup>20</sup> the defendants were indicted for failing to perform their duties as public officials. They pleaded that they had refrained from acting in the particular instance because a statute had relieved them of their duties. The statute had later been declared unconstitutional. The upper court held that the defendants should not be convicted. The holding of the case suggests that wherever a person is under a duty to act, there is a judicial disposition to hold that he is not liable criminally for failure to act, if he reasonably believed that his duty did not arise in the particular situation.<sup>21</sup> To hold otherwise would be to place a premium upon tenure of office.

<sup>13</sup> See *Jacksonville Public Service Corp. v. Calhoun Water Co.*, 219 Ala. 616, 123 So. 79 (1929); *State v. Boyett*, 32 N. C. 336 (1849).

<sup>14</sup> The policy behind the statute is determinative of its character. *State v. Laundry*, 103 Ore. 443, 204 Pac. 958 (1922). Punishment of a person for an act in violation of law, when he is ignorant of the facts making it so, does not deny due process of law. *United States v. Balint*, 258 U. S. 250, 42 Sup. Ct. 301 (1922). The mere commission of a proscribed act may constitute a crime. *Landen v. United States*, 299 Fed. 75 (C. C. A. 6th, 1924); *State v. McLean*, 121 N. C. 589, 28 S. E. 140 (1897).

<sup>15</sup> *Schuster v. State*, 48 Ala. 199 (1872); *Gately v. Taylor*, 211 Mass. 60, 97 N. E. 619 (1912).

<sup>16</sup> *Ex parte Davis*, 21 Fed. 396 (C. C. D. Ky. 1884); *Camden v. State*, 56 N. J. L. 244, 28 Atl. 82 (1893); *Buffalo Gravel Corp. v. Moore*, 39 N. Y. Cr. Rep. 511, 201 App. Div. 242 (1922).

<sup>17</sup> *Barker v. State*, 118 Ga. 35, 44 S. E. 874 (1903).

<sup>18</sup> 184 Ark. 1120, 44 S. W. (2d) 1097 (1932).

<sup>19</sup> Other instances: *Ex parte Masters*, 126 Okla. 80, 258 Pac. 861 (1927) (conviction for violation of speed law); *State v. Ehr*, 57 N. D. 310, 221 N. W. 883 (1928) (conviction for violation of a "police power" act). See Note (1930) 66 A. L. R., *supra* note 9. Repudiations of the rule allowing convictions may be found in *Lang v. Bayonne*, *supra* note 4; *State v. Carroll*, 38 Conn. 449 (1871).

<sup>20</sup> 123 N. C. 697, 31 S. E. 221 (1898).

<sup>21</sup> A striking illustration of the force of this proposition may be found in the recent case of *Burns v. State*, 61 S. W. (2d) 512 (Tex. Cr. App. 1933). That reliance on an unconstitutional statute may serve to show that the defendant did not act maliciously, see *Birsall v. Smith*, 158 Mich. 390, 122 N. W. 626 (1909) (civil action for malicious prosecution).

With greater force may it be said that in all crimes among whose necessary mental elements are knowledge, fraud, or malice, reliance upon a statute, later declared unconstitutional, is a good defense. So, in a prosecution for larceny, it should be sufficient to show by way of defense that by virtue of an unconstitutional statute the defendant believed the goods he asported were his own, since one of the mental constituents of the crime of larceny is the intent of the defendant *to deprive another* of his property.

(c) A statute, purportedly repealing another statute, may substitute a lower standard of conduct as the test of due care in a particular situation. If that later statute be unconstitutional, may the defendant nevertheless plead belief in its validity as a defense in a prosecution under the repealed statute? The answer is found in the recent case of *Claybrook v. State*.<sup>22</sup> This was a prosecution for involuntary manslaughter. The defendant had been one of the drivers in a fatal automobile accident. He had been driving at a rate of speed authorized by a speed law which was later declared unconstitutional for some technical reason. The invalidity of the speed law had the effect of continuing an existent statute which did not permit the rate of speed at which the defendant was driving. The conviction was set aside. It was held that "criminal responsibility may not be predicated on the theory that the subsequently determined unconstitutionality of the speed law rendered it *void ab initio* so that the defendant, if driving however slightly above the former speed law when the fatal collision took place, was guilty of criminal negligence."<sup>23</sup>

(d) To constitute a criminal *mens rea* in a particular crime, it may only be necessary that the defendant intend certain prohibited consequences to ensue from his physical expression. May the manifest existence of this intent be "negatived" or disregarded by a showing that his intentional conduct was the product of reliance upon an unconstitutional statute? For example, an intentional killing without sufficient provocation is murder. A statute declares that in case of an unwarranted assault, the person assaulted may stand his ground, and use all means necessary to resist the assault. X, believing the statute to be valid, does not retreat when he is attacked, and kills his assailant in the combat which follows. The statute is later declared unconstitutional and X is indicted for the murder of his assailant, on the ground that he was bound to retreat under the existent law.

All of the cases involving crimes based upon intent appear to concern defendants who have violated both repealed and repealing statutes.<sup>24</sup> In such cases the defendant could obviously not have relied upon the repealing statute. There is no indication, therefore, as to the effect of reliance in this situation. It is doubtful, however, that there should be a conviction, if the defendant's belief in the legality of his conduct was *bona fide* and reasonable, and if, at the same time, his conduct appealed to the moral sense of the court. The question, it must be admitted, remains unanswered by present adjudication.<sup>25</sup>

<sup>22</sup> 164 Tenn. 440, 443, 51 S. W. (2d) 499, 499 (1932).

<sup>23</sup> Prosecution for failure to perform a statutory duty may be placed in the same category. But inasmuch as many courts are inclined to say that *knowledge* of an official, and not merely unreasonableness of belief, is a component of the crime, such cases are placed in (b).

<sup>24</sup> *Rotner v. State*, 55 S. W. (2d) 98 (Tex. Cr. App. 1932); *State v. Boylston*, 138 La. 21, 69 So. 860 (1915).

<sup>25</sup> Some of the cases cited under section (a), where a conviction is allowed, may belong in the group of cases dealing with crimes based upon intent as in (d). It is not clear from the cases whether or not a criminal intent is required. Mere belief in the unconstitutionality of a statute is no defense. *Hunter v. State*, 158 Tenn. 63, 12 S. W. (2d) 361 (1928). Ignorance of the existence of a statute is no defense. *Commonwealth v. Liberty Products Co.*, 84 Pa. Super. 473 (1925). But where such belief or ignorance shows that the defendant did not have one of the necessary mental components of a crime, it makes for a good defense. *United States v. One Buick Coach Automobile*, 34 F. (2d) 318 (N. D. Ind. 1929).

### III. *The Adequacy of a Defense Based on Reliance When the Statute Has Been Adjudged Valid*

Suppose that the highest court of the jurisdiction, at some time prior to the defendant's reliance, has declared the part of the statute upon which the defendant relied, to be constitutional. It would seem that by virtue of this decision the defendant is more adequately protected in case the statute should later be declared unconstitutional. Most courts even go so far as to say that there may be a valid defense in prosecutions for crimes which do not require a *mens rea*.<sup>26</sup> Such decisions indicate that reliance upon a judicial decision declaring a statute constitutional incapacitates the reliant actor to commit a crime, just as does insanity or nonage.

If, therefore, a good defense is possible on grounds of reliance, where no *mens rea* is required for a particular crime, *a fortiori*, where knowledge, malice, or fraud<sup>27</sup> must be shown, the defendant's *bona fide* reliance makes a good defense. It would also appear that the defendant has a good defense in crimes based upon criminal intent as in (d) of the foregoing section.<sup>28</sup>

One important qualification must be made to the otherwise complete protection which reliance upon a statute previously declared constitutional affords. The court must be satisfied as to the moral credit of the defendant's conduct.<sup>29</sup> In Bishop's *New Criminal Law*,<sup>30</sup> it is declared that, while no change in construction should be adopted which would have the effect to punish a man for an act in itself innocent, and which had theretofore been adjudged as not within the restraint of a statute, since such overturning of an established doctrine would be too much in the nature of *ex post facto* judicial legislation, yet, if what a man did was *malum in se*, so that he was conscious of wickedness in so doing it, there would be no weighty objection to overruling the former doctrine if clearly wrong.

The decisions holding that reliance is a good defense when the statute has previously been adjudged constitutional are sometimes rested on the proposition that the doctrine of *stare decisis* prevents a retrospective application of the later decision,<sup>31</sup> sometimes on broader grounds of justice,<sup>32</sup> admitting a plain exception to the doctrine, *ignorantia legis non excusat*. But the prior decision, to make for a valid defense, must be a declaration by the highest court of the jurisdiction that the statute is constitutional. The decision of a lower court is insufficient.<sup>33</sup>

It may seem a paradox that reliance upon a statute judicially declared constitutional is more potent as a defense than reliance upon a statute that has

<sup>26</sup> *State v. O'Neil*, 147 Iowa 513, 126 N. W. 454 (1910); *Ingersoll v. State*, 11 Ind. 464 (1858). *Contra*: *Boyd v. State*, 53 Ala. 601 (1875).

<sup>27</sup> *Lutwin v. State*, 97 N. J. L. 67, 117 Atl. 164 (1922); *People v. Kamhout*, 227 Mich. 172, 198 N. W. 831 (1924); *State v. Evertz*, 190 S. W. 287 (Mo. 1916).

<sup>28</sup> *Odum v. State*, 132 Miss. 3, 95 So. 253 (1923). On the general subject, see Note (1911) 33 L. R. A. (N. S.) 788.

<sup>29</sup> *Lanier v. State*, 57 Miss. 102 (1879); *State v. Fulton*, 149 N. C. 485, 63 S. E. 115 (1908).

<sup>30</sup> 1 BISHOP, *NEW CRIMINAL LAW* (9th ed. 1923) §§ 95, 96 and 295.

<sup>31</sup> *People v. Tompkins*, 186 N. Y. 413, 79 N. E. 326 (1906); *State v. Longino*, 109 Miss. 125, 67 So. 902 (1915). See also *Grubbs v. State*, 24 Ind. 295 (1865).

<sup>32</sup> *State v. O'Neil*, *supra* note 26; *Lutwin v. State*, *supra* note 27. The constitutional provision against *ex post facto* legislation applies only to legislative acts, not to changes in decisions by courts in criminal cases with a retroactive effect. *Ross v. Oregon*, 227 U. S. 150, 33 Sup. Ct. 220 (1913).

<sup>33</sup> *State v. Striggles*, 202 Iowa 1318, 210 N. W. 137 (1926); *State v. Stevenson*, 98 Ore. 285, 193 Pac. 1030 (1920). Reliance upon an injunction is insufficient. *State v. Wadhams Oil Co.*, 149 Wis. 58, 134 N. W. 1121 (1912).

never been so declared. But the rule is only one illustration of the oft-asserted supremacy of law over government, of the judiciary over the legislature.<sup>34</sup>

### Conclusion

Surely the conduct of a person who relies upon an apparently valid statute should be excused, in all cases. The courts themselves recognize a strong presumption in favor of the validity of a statute<sup>35</sup>: they are unwilling, unless the necessity to decide the case before them demands, to question the constitutionality of any statute;<sup>36</sup> they strive, wherever possible, to uphold it as constitutional.<sup>37</sup> By this policy they prolong the period of possible reliance, and often create the situation which comes before them for adjudication. It is important that the *cause* of the defendant's ignorance of the law should be considered.<sup>38</sup>

No resort may reasonably be had to the sophistry that no one is bound to obey an invalid statute.<sup>39</sup> For by hypothesis the reliant actor has no reasonable means of knowing that the statute is unconstitutional. As is stated in the case of *Lang v. Bayonne*,<sup>40</sup>

"To require the citizen to determine for himself, at his peril, to what extent, if at all, the Legislature has overstepped the boundaries defined by the Constitution in passing this mass of statutes, would be to place upon him an intolerable burden, one which it would be absolutely impossible for him to bear,—a duty infinitely beyond his ability to perform. In my opinion, the provisions of a solemn act of the Legislature, so long as it has not received judicial consideration, are as binding upon its citizens as is the judgment of a court rendered against him so long as it remains unreversed."

There should be no conviction in any case where the defendant has based his conduct upon the provisions of a statute.

R. H. S.

**RIGHT OF SURFACE OWNER TO HAVE HIS BUILDINGS SUPPORTED BY THE SUBJACENT LAND**—The common law gives every landowner certain rights in reference to uses of other land that affect the use and enjoyment of his land. These rights, incident to the ownership of land and not dependent on any agreement between the owners of the dominant and servient lands, are, in this country, generally known as "natural rights".<sup>1</sup> They owe their existence to the fact that, without them, a landowner might be, in part or in whole, deprived of the use and enjoyment of his land,<sup>2</sup> a result not only unacceptable to him but also opposed to a public policy favoring the occupation and utilization of all land. Two of these "natural rights" are the right of the landowner to have his

<sup>34</sup> See DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW (1927) c. 2.

<sup>35</sup> Dawson v. Kentucky Distilleries and Warehouse Co., 255 U. S. 288, 41 Sup. Ct. 272 (1921); Pure Oil Co. v. Minnesota, 248 U. S. 158, 39 Sup. Ct. 35 (1918).

<sup>36</sup> Aikins v. Kingsbury, 247 U. S. 484, 38 Sup. Ct. 558 (1918); Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597 (1923).

<sup>37</sup> New York Central R. R. v. Chisholm, 268 U. S. 29, 45 Sup. Ct. 402 (1925).

<sup>38</sup> (1933) 81 U. OF PA. L. REV. 1003.

<sup>39</sup> The real problem is whether the defendant may *rely* on the statute.

<sup>40</sup> *Supra* note 4, at 460, 68 Atl. at 92.

<sup>1</sup> TIFFANY, REAL PROPERTY (1912) §§ 295-303.

<sup>2</sup> *Id.* § 295.

land supported by the adjacent land, and the right of the surface owner to have his surface supported by the subjacent land.<sup>3</sup> The right of any landowner to have his land supported by other land is not, of course, violated if the owner of the other land substitutes for a natural support a sufficient artificial support. Any reference, therefore, in this note to "support by other land" means, unless the context otherwise requires, support by natural land or some substitute therefor.

The common law gives every landowner a right of action against one who, by excavating or improving the adjacent land, causes the land in its natural state to sink.<sup>4</sup> Cases have held that the natural right to support by adjacent land does not include a right of support for land which has had placed upon it an additional weight such as a building.<sup>5</sup> Where ownership of surface land is in one person, and ownership of subjacent land, or minerals therein, is in another, the owner of the former has a natural right of support from the subjacent land or minerals, and consequently may recover damages if injured by the withdrawal of such support.<sup>6</sup> Textwriters<sup>7</sup> and many *dicta*<sup>8</sup> in cases are to the effect that this natural right to subjacent support, however, like that to lateral support, exists in favor of land in its natural state only, and the owner of the lower stratum is under no obligation to furnish support for buildings in addition to the land. The writer has found no cases actually holding that buildings erected on the surface are or are not entitled to support by the subjacent land.<sup>9</sup> Under what circumstances should a landowner have the right to have his buildings supported by subjacent land?

Excluding problems arising under acquisition by prescription, estoppel, or statutes, this question may arise in the following situations:

1. Where there is an express grant by the owner of the subjacent land to the surface owner, giving the surface owner, under certain or all conditions, the right to have his building supported.
2. Where there is a "release" by the surface owner to the owner of the subjacent land of any duty, under certain or all conditions, to support the building.
3. Where there is no express grant or "release", and there is no evidence sufficient to establish a parol agreement, *i. e.*, an agreement not under seal, between the parties in regard to support of the building.
4. Where there is no express grant or "release" but there is evidence sufficient to establish a parol agreement regarding support of the building, the

<sup>3</sup> *Id.* § 301.

<sup>4</sup> *Thurston v. Hancock*, 12 Mass. 220 (1815); *Gilmore v. Driscoll*, 122 Mass. 199 (1876); *Richardson v. Vermont Cent. R. R.*, 25 Vt. 465 (1853). See *Wyatt v. Harrison*, 3 Barn. & Adol. 871 (Eng. 1832); *Turnstall v. Christian*, 80 Va. 1 (1885); *Moody v. McClelland*, 39 Ala. 45 (1863); *Charles v. Rankin*, 22 Mo. 566 (1856).

<sup>5</sup> *Thurston v. Hancock*, *supra* note 4; *Gilmore v. Driscoll*, *supra* note 4; *Lasala v. Holbrook*, 4 Paige 169 (N. Y. 1833); *Panton v. Holland*, 17 Johns. 92 (N. Y. 1819); *Turnstall v. Christian*, *supra* note 4; *Wyatt v. Harrison*, *supra* note 4. See *Moody v. McClelland*, *supra* note 4; *Charles v. Rankin*, *supra* note 4; *Northern Transportation Co. v. City of Chicago*, 99 U. S. 635 (1878).

<sup>6</sup> *Humphries v. Brogden*, 12 Q. B. 739 (Eng. 1850); *Wilms v. Jess*, 94 Ill. 464 (1880); *Carlin v. Chappel*, 101 Pa. 348 (1882). See *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538 (1874).

<sup>7</sup> *TIFFANY*, *op. cit. supra* note 1, 672; *GODDARD*, *EASEMENTS* (5th ed. 1896) 67.

<sup>8</sup> See *Marvin v. Brewster Iron Min. Co.*, *supra* note 6; *Wilms v. Jess*, *supra* note 6; *Jackson Hill Co. v. Bales*, 183 Ind. 276, 108 N. E. 962 (1915); *Morris v. Coal Co.*, 211 Ill. App. 186 (1918).

<sup>9</sup> Even the cases cited by the text writers as holding that the natural right of subjacent support exists only in favor of the land in its natural state do not actually so hold but merely contain *dicta* to that effect. See *TIFFANY*, *op. cit. supra* note 1, 672.

agreement being capable of specific performance. This situation is, in effect, the same as either the first or the second, depending on the nature of the agreement.<sup>10</sup>

5. Where there is no express grant or "release" but there is evidence sufficient to establish a parol agreement regarding support of the building, the agreement being incapable of specific performance.

Where there is an express grant or "release" of support of the building it would doubtless everywhere be controlling. Even assuming it renders practically impossible the occupation and utilization of either the surface or the subjacent land, the public policy favoring occupation and utilization of that land would not be regarded by courts as sufficient to vitiate an express grant.

Where there is neither an express grant or "release" nor evidence sufficient to establish a parol agreement between the parties regarding support of buildings erected on the surface, it is the opinion of the writer that the so-called doctrine of easement of necessity should be applicable. The surface owner should normally have an easement of support by necessity in the subjacent land in favor of his land and the buildings thereon, certainly insofar as the buildings constitute a reasonable use of the land. It is no doubt true that courts generally have not applied the doctrine of easement of necessity in the subjacent support cases,<sup>11</sup> and it has even been said by Professor Simonton, that the right of subjacent support cannot be an easement.<sup>12</sup> To determine the applicability of the doctrine of easement of necessity, and, if applicable, the nature and extent of the easement right gained, the reason for, and the theory of, the doctrine must be examined.

It is generally recognized that the real basis for the doctrine is public policy.<sup>13</sup> It is to the interest of the state that all land should be fully utilized. In *Packer v. Welstead*,<sup>14</sup> in 1658, in which a way of necessity, by far the most common instance of an easement of necessity, was allowed, Chief Justice Glyn said, "But the jurors having found it to be a way of necessity, it seems to me that the way remains, for it is not only a private inconvenience, but *it is also to the prejudice of the public weal, that land should lie fresh and unoccupied.*"<sup>15</sup> This decision has ever since represented the law.

Easements of necessity are generally based on the theory of implied grant or implied reservation.<sup>16</sup> As has been pointed out by Professor Simonton,<sup>17</sup> this attempt to base the easement on the presumed intent of the parties was probably due to the mode of juristic thinking of the period. During the 19th century, it was considered that rights arose because of the exercise of the wills

<sup>10</sup> If the parol agreement is written and there is sufficient consideration, or is oral and has been sufficiently acted on, to render it capable of specific performance, the practical effect, for this purpose, is the same as though it had been performed, *i. e.*, as though there had been a grant or a release.

<sup>11</sup> See however *Humphries v. Brogden*, *supra* note 6, in which the right of the surface owner to support from the subjacent strata was based on implied grant, apparently because of the necessity.

<sup>12</sup> Simonton, *Ways by Necessity* (1925) 25 COL. L. REV. 571, 592. Professor Simonton argues that the right of subjacent support cannot be said to be an easement since clearly the right of support, being an incident to the ownership, would not violate a covenant against incumbrances (he cites no cases). Even though it be assumed, as Professor Simonton apparently does, that all easements violate a covenant against incumbrances, still his argument does no more than beg the question.

<sup>13</sup> Simonton, *supra* note 11, at 574.

<sup>14</sup> 2 Sid. 39 (Eng. 1658). A translation will be found in 3 GRAY, CASES ON PROPERTY (2 vol. ed. 1906) 347.

<sup>15</sup> *Id.* at 111. Italics inserted.

<sup>16</sup> TIFFANY, *op. cit. supra* note 1, at 714.

<sup>17</sup> Simonton, *supra* note 11, at 576.



of individuals. As a result there was a strong tendency to reduce everything in the nature of a legal transaction to a contract. As is pointed out by Professor Bohlen,<sup>18</sup> this tendency led the courts to refer all possible obligations to the consent of the party on whom they were imposed. As a result, voluntary assumption of risk, the fellow servant rule, and the like, were based on some implied terms of contract. So it is not strange to find easements by necessity based on implied contracts, *i. e.*, implied grants or implied reservations. The easement was, and still is, by most courts, regarded as resulting on the theory that the grantor and grantee of the land intend that it shall exist, and courts merely declare that the particular circumstances of the transaction raise a presumption of such an intention. The necessity of the situation is regarded as evidence of the intention of the parties.

"For the law will not presume that it was the intention of the parties that one should convey land to the other, in such manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion so as to deprive himself of the enjoyment of the remainder. The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties."<sup>19</sup>

It is to be noted however that, though the grantee knew nothing of the dominant tenement at the time of the grant, yet his land will be burdened with an easement; and a covenant of warranty in his deed does not prevent the implication of the easement.<sup>20</sup> It is evident that the easement by necessity is imposed, regardless of the knowledge of the parties as to the circumstances, and regardless of their actual intent, unless there is evidence sufficient to prove a contrary intent.<sup>21</sup>

While the doctrine is really based on considerations of public policy, the theory that the easement of necessity arises because of the intent of the parties has frequently influenced the result reached. As a consequence, the result has not always been in accord with the underlying public policy.<sup>22</sup> For example, cases have held that mere necessity alone is not sufficient to give rise to such an easement, and that the party claiming the easement must allege and prove that title to both was derived from a common owner.<sup>23</sup> Also it has been held that, since the easement is based on the presumed intent of the parties, evidence of a parol agreement of the parties to the contrary is admissible to rebut the presumption of intention.<sup>24</sup>

What degree of necessity must be shown to establish the easement? By the weight of authority there must be a strict necessity—a reasonable necessity or convenience is not sufficient.<sup>25</sup> This strict necessity is probably a result of

<sup>18</sup> Bohlen, *Voluntary Assumption of Risk* (1906) 20 HARV. L. REV. 14, 31-32.

<sup>19</sup> Collins v. Prentice, 15 Conn. 39, 44 (1842).

<sup>20</sup> Powers v. Heppman, 233 Ill. 597, 84 N. E. 661 (1908); Vandalia R. R. v. Fumas, 182 Ind. 306, 106 N. E. 401 (1914); Brigham v. Smith, 70 Mass. 297 (1855).

<sup>21</sup> See Simonton, *supra* note 11, at 575. The effect of evidence proving a contrary intent will be discussed later.

<sup>22</sup> Simonton, *supra* note 11, at 579.

<sup>23</sup> Stewart v. Hartman, 46 Ind. 331 (1874); Bullard v. Hamson, 4 M. & S. 387 (Eng. 1815); Proctor v. Hodgson, 10 Exch. 324 (Eng. 1855); Wilks v. Greenway, 6 T. L. R. 449 (Eng. 1890).

<sup>24</sup> Ewert v. Bortis, 12 Atl. 893 (N. J. Eq. 1888); Tibus v. Boston, 107 Ky. 98, 51 S. W. 609 (1899); Golden v. Rupard, 25 Ky. L. Reg. 2125, 80 S. W. 162 (1904). See Orpin v. Morrison, 230 Mass. 529, 120 N. E. 183 (1918).

<sup>25</sup> United States v. Rindge, 208 Fed. 611 (P. C. Cal. 1913); Ward v. Robertson, 77 Iowa 159 (1889); Hildreth v. Googins, 91 Me. 227, 39 Atl. 550 (1898); Whitehouse v. Cummings, 83 Me. 91 (1890); Dee v. King, 73 Vt. 375, 50 Atl. 1109 (1901).

the theory of implied grant or implied reservation.<sup>26</sup> If the necessity is evidence of the intent of the parties, then it is reasonable that unless absolutely necessary, no intent should be implied, particularly against a grantee. But considered from the viewpoint of public policy, it might well be argued that the easement ought to be allowed whenever it is reasonably necessary to enable the owner to enjoy his land. As regards the principle that a grant is to be construed most strongly against the grantor, cases have held, and it is generally recognized, that this principle has little or no application to cases of easements of necessity.<sup>27</sup>

Irrespective of whether the doctrine of easement of necessity is based purely on public policy, or is regarded as existing on the theory of presumed intention, the doctrine seems perfectly applicable to cases involving subjacent support. It is absolutely necessary to the use and enjoyment of land that it be supported, both laterally and subjacently. Since it is impossible for the surface owner to support his surface artificially if the subjacent owner removes the support afforded by the subjacent land, and does not substitute a sufficient artificial support, it is necessary to the use and enjoyment of the surface that the subjacent owner either should not remove the support afforded by his land, or if he does, that he supply a sufficient artificial support. Whether merely a reasonable or a strict necessity is required to establish an easement of necessity, it is obvious that either is satisfied in the case of subjacent support. In cases of lateral support, in all of which it is theoretically possible for the landowner himself to support his land laterally, without the coöperation of the adjacent landowner, obviously only those few courts not requiring a strict necessity would consider applying the doctrine of easement of necessity.<sup>28</sup> The situation in which the support of the subjacent land is involved is fairly analogous to that in which two stories of an apartment house are owned by different persons, in which cases the owner of the upper story has an easement of support in the lower story.<sup>29</sup>

If the surface owner, in the absence of a grant, release or parol agreement to the contrary, is given an easement of support by necessity in the subjacent land, what is the extent of the easement right? Is the easement limited to that which is necessary for the use of the land in its natural state, or for the use being made of it at the time of the grant, or for the reasonable use of the land, or for any lawful use of the land? If the easement is based solely on social considerations, then it ought to be adequate in scope to enable the dominant owner to have the reasonable enjoyment of his land as long as the necessity continues. If the easement is based on the intention imputed to the parties at the time of the severance of the ownership, it follows that its extent should be

<sup>26</sup> Simonton, *supra* note 11, at 580.

<sup>27</sup> See Simonton, *supra* note 11, at 573, 601.

<sup>28</sup> The minority view allows an easement of necessity even though there be no strict necessity. *Pettingill v. Porter*, 8 Allen 1 (Mass. 1864).

<sup>29</sup> The analogy was drawn in an English case. In *Humphries v. Brogden*, which held that the owner of the surface is entitled to support from the subjacent strata, the court said: "The books of reports abound with decisions restraining a man's acts upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others. The case of common occurrence nearest to the present is, where the upper story of a house belongs to one man and the lower to another. The owner of the upper story, without any express grant, or enjoyment for any given time, has a right to the support of the lower story. If this arises (as has been said) from an implied grant or covenant why is not a similar grant or covenant to be implied in favor of the owner of the surface of land against the owner of the minerals? If the owner of an entire house, conveying away the lower story only, is without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should not an owner of land, who conveys away the minerals only, be entitled to the support of minerals for the benefit of the surface?" *Humphries v. Brogden*, *supra* note 6, at 747.

determined with reference to that which is necessary for the use of the premises in the manner presumably contemplated by the parties at the time of such severance. In the absence of any evidence on the subject, it would seem that the parties should be presumed to have had in mind, at least, a reasonable use of the land. The cases involving ways of necessity indicate that the scope of easements of necessity should be such as to enable the dominant owner to enjoy his land for all lawful purposes. The parties are presumed to have had in mind, in the absence of evidence, any lawful use of the land.

In *Myers v. Dunn*,<sup>30</sup> the owner of a tract of land, bounded by a highway on the east, and another on the west, sold a center lot to *K*, with a right of way across the west lot "for the purpose of carting wood". Later, *K* sold to defendant, who built a dwelling house on the center lot, and claimed a way of necessity over the east lot. The court held that he was entitled to it, saying,

"The owner of land has a right to the most profitable use, the most beneficial enjoyment thereof, subject to limitations not necessary here to be mentioned. He may erect buildings and raise grain upon, and dig ores beneath it; and when, by their conveyance to defendant's grantor the administrators imposed, in favor of the land granted, a way of necessity over the locus quo, they are to be presumed to have intentionally done it for any and all of these purposes; and the law will declare that it may be used for all; for it desires and encourages proprietors to increase the value of their land by building houses upon it and cultivating it." <sup>31</sup>

In *Whittier v. Winkley*,<sup>32</sup> defendant's grantor impliedly reserved a way of necessity over plaintiff's lot in favor of the defendant's lot. Defendant later erected buildings on his lot, and claims that he is entitled to enlarge the existent right of way for new purposes. In holding that he was so entitled,<sup>33</sup> the court said:

"If the fact of the necessity for the way is evidence that the parties intended by the deed to recognize and establish such an easement, the fact that it is necessary for all purposes to which the land is adapted, is evidence that a general and not a limited way was intended. A deed conveying land for all lawful purposes furnishes no evidence that the implied way of necessity was intended to be used for the accomplishment of one of those purposes only. The necessity is originally coextensive with all the lawful uses for which the rear lot is capable, and is not created by the appropriation of the land to those uses." <sup>34</sup>

It being more than reasonable to say that the surface owner should have an easement of support by necessity in the subjacent land, and since the easement of necessity, in the case of ways of necessity, has been held to exist in favor of land for all lawful purposes, and clearly should exist at least in favor of the land while it is being used reasonably, it would seem that a surface owner should have a right to have his buildings supported by the subjacent land, certainly insofar as the buildings constitute a reasonable use of the land.

Since it is well established that if one conveys minerals beneath his land the grantee may be entitled, on the theory of necessity, to use the surface for all purposes necessary to the reasonable mining of the minerals—*e. g.*, erecting air

<sup>30</sup> 49 Conn. 71 (1881).

<sup>31</sup> *Id.* at 77.

<sup>32</sup> 62 N. H. 338 (1882).

<sup>33</sup> Accord: *Crotty v. Pocahontas Co.*, 72 W. Va. 68, 78 S. E. 233 (1913); *Uhl v. Ohio River R. Co.*, 47 W. Va. 59 (1899).

<sup>34</sup> 62 N. H. at 341.

shafts, water storage facilities, and machinery on the surface, or dumping waste thereon<sup>35</sup>—it seems only fair to give the surface owner a right to have his land supported so long as he uses it reasonably. Clearly the mere fact that he erects buildings thereon does not normally constitute an unreasonable use of the land.

Assuming a modern court would be willing to recognize a right in the surface owner to have his buildings supported by the subjacent land on the doctrine of easement of necessity, it would probably require that the surface owner allege and prove that both tenements were derived from a common owner, and also would probably admit evidence of a parol agreement of the parties, though incapable of specific performance, to rebut the presumption of intention, still used by most courts as the basis for the easement. The requirement of proof of a common owner, as has been pointed out, is clearly not in accord with the real basis for the doctrine of easement of necessity. The public policy upon which the doctrine is based would merely require proof of the necessity. Though the social interest behind the doctrine is not strong enough to prevail over the real intent of the parties if adequately expressed, the admission of parol evidence to show the real intent of the parties is opposed, it would seem, to the general policies behind the parol evidence rule and the Statute of Frauds.<sup>36</sup>

In the absence of a "release" by the surface owner to the subjacent landowner of any duty to support buildings erected on the surface, every surface owner should normally,<sup>37</sup> without the necessity of tracing back to a common owner, have a right to have his buildings supported by the subjacent land, certainly insofar as the buildings constitute a reasonable use of the land, and evidence of a parol agreement to the contrary should not be admissible. In effect this is giving the surface owner, according to the usual definition of "natural rights"<sup>38</sup> a natural right to have his buildings supported by the subjacent land.<sup>39</sup>

*J. E. D.*

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<sup>35</sup> *Baker v. Pittsburgh*, 219 Pa. 398 (1907).

<sup>36</sup> See Note (1919) 29 *YALE L. J.* 665.

<sup>37</sup> Since the real reason for giving the surface owner the right to have his buildings supported is one based on considerations of public policy, if, in an abnormal situation, it should appear that it was for the best interest of the state that such right should not exist, it would seem that the court would be justified in refusing to recognize it.

<sup>38</sup> Natural rights as we have seen, are those rights which every landowner has in the absence of any grant, incident to the ownership of land and not depending on any agreement between the parties.

<sup>39</sup> The right, which the writer suggests should be given the surface owner, would clearly be incident to the ownership of land and not dependent on any agreement between the parties. And it would seem that an easement of necessity should be regarded as a natural right, one of the normal rights of ownership in land. The real basis for the recognition of so-called "natural rights" is the same as the real reason for giving the dominant tenement an easement of necessity—a public policy favoring the occupation, cultivation, and development of land.